87-1931

Supreme Court, U.S.
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MAY 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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WILLIAM A. FITZSIMMONS PETITIONER.

v.

MARY ANN FITZSIMMONS.

ROBERT OLSEN.

LINDA ROBERSON. CASE NO: _____

DAVID WALSH.

HONORABLE ROBERT R. PEKOWSKY.

HONORABLE DANIEL R. MOESER.

RESPONDENTS.

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Address: WILLIAM A. FITZSIMMONS, PRO SE
P.O. BOX 82586
TAMPA, FL 33682
(813) 977-1189

## QUESTIONS PRESENTED FOR REVIEW

a) Whether the Federal Court of Appeals for the Seventh Circuit lacks jurisdiction to issue a writ of mandamus directed to Dane County, Wisconsin, Judge Robert R. Pekowsky to require a judgment of divorce be vacated; and

b) Whether the Federal Court of Appeals for the Seventh Circuit lacks jurisdiction to issue a writ of mandamus directed to Dane County, Wisconsin, Judge Daniel R. Moeser to require a post-divorce court order revising the property division be rescinded.

## LIST OF PARTIES TO THIS PROCEEDING

WILLIAM A. FITZSIMMONS, PETITIONER, PRO SE

ADDRESS:
P.O. BOX 82586
TAMPA, FL 33682
(813) 977-1189

RESPONDENTS:

MARY ANN FITZSIMMONS AND ROBERT OLSEN BY
LAWTON & CATES, S.C.
Mr. George Aumock
214 West Mifflin Street
Madison, WI 53703
(608) 256-9031

ATTORNEY LINDA ROBERSON BY
STOLPER, KORITZINSKY, BREWSTER &
NEIDER, S.C.
Mr. Ralph M. Cagle
7617 Mineral Point Road
Madison, WI 53705
(608) 833-7617

ATTORNEY DAVID WALSH BY
FOLEY & LARDNER
Mr. Peter F. Krug
One South Pinckney Street
Madison, WI 53701
(608) 257-5035

HONORABLE JUDGE ROBERT R. PEKOWSKY
DANE COUNTY CIRCUIT COURT BRANCH 5
City-County Building
Madison, WI 53709
(608) 266-9095

HONORABLE JUDGE DANIEL R. MOESER
DANE COUNTY CIRCUIT COURT BRANCH 11
City-County Building
Madison, WI 53709
(608)) 266-4377

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- 767.085 (4) - DEFENSES ABOLISHED A1, 8

JURISDICTION

On February 8, 1988, the United States Court of Appeals for the Seventh Circuit ordered that:

IT IS ORDERED that the "MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS SUBMITTED BY PLAINTIFF-APPELLANT AND DIRECTED TO HONORABLE ROBERT R. PEKOWSKY AND HONORABLE DANIEL R. MOESER" is GRANTED and the petition for a writ of mandamus is DISMISSED for lack of jurisdiction.

The jurisdiction of the Supreme Court of the United States may be invoked under Title 28 U.S.C.A., Section 1254(1).

CONSTITUTIONALITY OF STATE STATUTE

28 U.S.C., Section 2403(b) may be applicable and the Wisconsin Attorney General has been served with this petition. No court has certified to Wisconsin Attorney General that the constitutionality of Wis. Chs. 765 through 768 are being questioned.

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I. Section 10: No state shall pass any ex post facto law.

Article I. Section 10: No state shall pass any law impairing the obligation of contracts.

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.

Amendment XIV: Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## WISCONSIN STATUTES INVOLVED (SEE APPENDIX)

765.001 - INTENT and CONSTRUCTION

767.085(4) - DEFENSES ABOLISHED

## STATEMENT OF CASE

Petitioner William A. Fitzsimmons seeks to have the December 23, 1980, Fitzsimmons v. Fitzsimmons divorce vacated, and a post-divorce court order revising the property division rescinded, by writ of mandamus because the original Judgment of Divorce on its face exhibits numerous violations of Wisconsin Statutes, and therefore this divorce is without legal force.

The petitioner first discovered this divorce was void on January 25, 1983.

The petitioner seeks a writ of mandamus because only this legal remedy will restore to him his original status of state citizenship, which was that of being married. (Plaintiff's intentions are to obtain a legal divorce so he may remarry.)

On January 8, 1988, petitioner filed a petition for a writ of mandamus in the United States Court of Appeals for the 7th

Circuit for the following reasons:

a) Wisconsin Statute 765.001 - INTENT and CONSTRUCTION designates the State to be an added real party of interest in both marriage and divorce, and therefore there is a conflict of interest on the part of the State as far as correcting past errors of the State is concerned; and

b) Because respondent Mary A. Fitzsimmons was the petitioner for the divorce, then Wisc. Stat. 767.085(4) rendered William A. Fitzsimmons defenseless throughout the divorce litigation. This defenselessness, taken in conjunction with the State's conflict of interest, makes redress in State courts virtually impossible; and

c) The petition for writ of mandamus was submitted to the Federal Court of Appeals because Federal Rule of Civil Procedure 81(b) abolishes such writs for District Courts, and thus the Appellant Court is the first court available for redress.

Also, and as was pointed out therein, the petition for writ of mandamus is related to Western District of Wisconsin, Case No. 87-C-166-S, now on appeal before the 7th Circuit Court of Appeals, Case 87-2219, in which Plaintiff William A. Fitzsimmons sued for substantial damages, alleging defendants Mary A. Fitzsimmons and Robert Olsen, and defendants and attorneys Linda Roberson and David Walsh, conspired to violate Plaintiff's Constitutional rights and Civil Rights under 42 U.S.C.A. Sections 1983 and 1985 by subjecting him to an illegal divorce. The issue on appeal is whether or not defendants and attorneys Roberson and Walsh performed under the color of state law at anytime during the divorce litigation. The petition for writ of mandamus was prompted because the issue on appeal does not address the question of the validity of this divorce.

## REASONS FOR ALLOWANCE OF WRIT

Pursuant to Supreme Court Rule 17.1(a) the 7th Circuit Court of Appeals may have decided a federal question in a way that significantly departs from accepted and usual judicial proceedings because this divorce is valid or void under the color of State law; and:

> "Whether there is 'color' of state law and whether there is conduct which deprives plaintiff in Civil Rights Act damage case, of constitutional right, are federal and not state questions; 42 U.S.C.A., Section 1983".*

In contrast, the Appellant Court's decision that it lacks jurisdiction over this matter remands the question of color of state law to state authorities.

*Marshall v. Sawyer, 301 F.2d 639, 640 (9th Cir. 1962).

Pursuant to Supreme Court Rule 17.1(c) and Wisconsin Statute 765.001, there may be an important question of federal law which has not been, but should be, settled by this Court, and this question is:

> Under the color of Wis. Stat. 765.001, is the State of Wisconsin a real party of interest in state marriages and divorces? In other words, since the 1978 enactment of Wisconsin's Family Code, are marriages and divorces now trilateral agreements rather than traditional bilateral contracts?

A second reason to allow this writ of certiorari based upon Supreme Court Rule 17.1(c) is the question of whether due process is available to the Petitioner in State courts if the State is a real party of interest and the Petitioner is defenseless before the law. Plaintiff notes, in Monroe v. Pape, 365 U.S. 167,

183. 81.S.Ct..473. it was held the federal remedy provided by the Civil Rights Act is supplementary to the state remedy. and the latter need not be first sought and refused before the federal one is invoked. "It is no answer." this Supreme Court has said. "that the State has a law that if enforced would give relief." See. also. Cohen v. Norris. 9th Cir.. 300 F.2d 24. Plaintiff respectfully submits the 7th Circuit Court of Appeal's dismissal for lack of jurisdiction may be in conflict with applicable decisions of this Court.

And finally. the Christian tradition of charity is not unlike the Marxist economic doctrine: From each according to their abilities. and to each according to their needs. This tradition and/or doctrine has been extended into the public domain at both State and Federal levels in the form of assistance to the indigent and needy. But. these forms of assistance are

deemed acceptable only in so far as they may be voluntary; voluntary with respect to give or not to give, and voluntary with respect to receive or not to receive.

However, when the otherwise voluntary economic policies of "From each according to their abilities; to each according to their needs" becomes legislated state-enforced policy, then the format of these economic exchanges is Communism. We have in this Country vigorously resisted the imposition of Communism, particularly upon ourselves. The American way is "To each according to their abilities," mediated by the tradition of voluntary Christian charity. The Plaintiff respectfully asserts the intent of Wisconsin law is to enforce upon marriage and divorce the involuntary acceptance of Communism. This conclusion is based upon the key sentence in Wisconsin Statute 765.001(2)-INTENT, which is:

> "Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and the other spouse".

Plaintiff respectfully asserts that such a State law is repugnant to the Constitution of the United States.

Notwithstanding Amendment X, which is generally interpreted to grant to the various States' jurisdiction in matters of marriage and divorce, and the Petitioner is aware of the summary of this Court's position on ex post facto law appearing in Dobbert v. Florida, 53 L Ed 2d 1146 (1977), Petitioner nevertheless asserts that by Wisconsin's 1978 law the state proclaimed itself ex post facto a real party of interest to the old 1962 Fitzsimmons marriage, thereby impairing the voluntary obligations of the marriage contract and thus precipitating an unwanted divorce which violated

Petitioner's XIVth Amendment rights; all this in addition to the fact that the divorce may not be valid under the color of State law.

CONCLUSIONS

For the foregoing reasons, petitioner William A. Fitzsimmons respectfully requests that a writ of certiorari be issued to review the order of the United States Court of Appeals for the Seventh Circuit dismissing Petitioner's petition for writ of mandamus.

Respectfully Submitted,

William A. Fitzsimmons Pro Se
WILLIAM A. FITZSIMMONS, PRO SE
P.O. BOX 82586
TAMPA, FL 33682
(813) 977-1189

Dated and served by First Class U.S. Mail this 23 day of May, 1988.

## WISCONSIN STATUTES INVOLVED

765.001(1)-TITLE. INTENT AND CONSTRUCTION OF CHS. 765 TO 768. TITLE. Chapters 765 to 768 may be cited as "The Family Code".

765.001(2)-INTENT....The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always....Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse.

765.001(3)-CONSTRUCTION. Chapters 765 to 768 shall be liberally construed to effect the objectives of sub. (2) above).

767.085(4)-DEFENSES ABOLISHED. Previously existing defenses to divorce are abolished.

**United States Court of Appeals**
For The Seventh Circuit
Chicago, Illinois 60604

February 8, 1988.

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

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|---|---|
| No. 88-1055 | Petition for Writ of Mandamus. No. 87 C 166 |
| IN THE MATTER OF: | |
| William A. Fitzsimmons, Petitioner. | JOHN C. SHABAZ, Judge |

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS SUBMITTED BY PLAINTIFF-APPELLANT AND DIRECTED TO HONORABLE ROBERT R. PEKOWSKY AND HONORABLE DANIEL R. MOESER" filed herein on January 14, 1988 by counsel for the defendants.

2. "RESPONSE TO MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS SUBMITTED BY PLAINTIFF-APPELLANT AND DIRECTED TO HONORABLE ROBERT R. PEKOWSKY AND HONORABLE DANIEL R. MOESER" filed herein on February 3, 1988 by pro se appellant.

On consideration thereof,

IT IS ORDERED that the "MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS SUBMITTED BY PLAINTIFF-APPELLANT AND DIRECTED TO HONORABLE ROBERT R. PEKOWSKY AND HONORABLE DANIEL R. MOESER" is GRANTED and the petition for a writ of mandamus is DISMISSED for lack of jurisdiction.

## DISTRICT COURT ORDERS

The Petition for Writ of Mandamus, from which this present Petition for Writ of Certiorari derives, was initially filed in the Seventh Circuit Court of Appeals because of F.R.C.P. 81(b). Thus, there are no District Court orders that underlie Appellant Court Cause Number 88-1055.

The Petition for Writ of Mandamus was, however, prompted by the disposition of District Case No. 87-C-166 now on appeal before the Seventh Circuit Court of Appeals, Cause No. 87-2219. The following are the (two) United States District Courts orders for this case.

## DISTRICT COURT ORDER DISMISSING LINDA ROBERSON AND DAVID WALSH

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM FITZSIMMONS,

Plaintiff,

v.

MARY ANN FITZSIMMONS, LINDA ROBERSON, DAVID WALSH, AND ROBERT OLSEN,

Defendants.

ORDER

87-C-166-S

ENTERED:

JUNE 17, 1987

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Plaintiff was denied leave to proceed *in forma pauperis* in this case on March 24, 1987, because he did not state a claim for relief under federal law. On April 6, 1987, he paid the filing fee and reopened this case.

Defendants Linda Roberson and David Walsh filed motions to dismiss which have been fully briefed and are now ready for decision. The motion to dismiss filed by defendants Mary Ann Fitzsimmons and Robert

Olsen will not be ready for decision until July 2, 1987.

For purposes of deciding a motion to dismiss the allegations of plaintiff's complaint must be taken as true. Plaintiff alleges in his complaint that in January 1980 his wife, Mary Ann Fitzsimmons, filed for a divorce. He alleges that his ex-wife and her attorney stole money from him. He also alleges that they sold his properties through defendant Robert Olsen in Michigan.

Plaintiff alleges that his attorney, David Walsh, gave him misleading legal advice and failed to protect his rights. He alleges that defendant Walsh breached the duty of reasonable care to which he was entitled.

CONCLUSIONS OF LAW

Plaintiff has brought this civil action under 42 U.S.C. Section 1983, claiming that the defendants violated his

constitutional rights. To state a claim under 42 U.S.C. Section 1983, plaintiff must allege that the defendants deprived him of his constitutional rights while acting under color of state law.

In this case plaintiff does not allege that the defendants were acting under color of state law. He alleges that the defendants were private attorneys. The professional acts of private attorneys are not performed under color of state law within the meaning of 42 U.S.C. Section 1983. Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975).

The allegations of plaintiff concerning the actions of the defendant attorneys may support state claims, but they do not rise to the level of constitutional violations.

Plaintiff has not alleged that the defendants acted under color of state law or that they violated his constitutional

rights. Therefore, plaintiff has not stated a claim for relief under federal law.

In his brief in opposition to defendants' motion to dismiss plaintiff alleges that the defendants discussed a contract in the presence of a state official and that this official was an unwitting co-conspirator with the defendants. These allegations are outside of the complaint and are not relevant to the motion to dismiss. Even were these allegations included in the plaintiff's complaint, they would not support the conclusion that the defendants acted under color of state law.

Plaintiff does not identify the state official or the capacity in which he was serving. In order to state a claim that private individuals acted under color of state law by conspiring with a state official, plaintiff must allege specific

facts that show the existence of a mutual understanding or meeting of the minds to deny a person's civil rights. Plaintiff has not made these necessary specific allegations. Therefore, he has not shown that the defendants acted under color of state law.

Plaintiff has failed to state a claim upon which relief can be granted. Therefore, the motions to dismiss filed by defendants Walsh and Roberson must be granted.

ORDER

IT IS ORDERED that the motions of defendants Walsh and Roberson to dismiss are GRANTED, with costs.

Entered this 17th day of June, 1987.

BY THE COURT:

JOHN C. SHABAZ
District Judge

## DISTRICT COURT ORDER DISMISSING MARY ANN FITZSIMMONS AND ROBERT OLSEN

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

---

WILLIAM FITZSIMMONS,

Plaintiff,

v.

MARY ANN FITZSIMMONS AND ROBERT OLSEN,

Defendants.

ORDER

87-C-166-S

ENTERED:

JUNE 30, 1987

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Defendants Mary Ann Fitzsimmons and Robert Olsen moved to dismiss this action on June 2, 1987, for plaintiff's failure to state a claim. On June 29, 1987, plaintiff filed a motion for voluntary dismissal.

For the reasons given in this Court's June 17, 1987 order, plaintiff failed to state a claim upon which relief can be granted. Therefore, the defendant's motion to dismiss will be granted and

costs will be awarded since the defendants filed their motion in a timely manner.

ORDER

IT IS ORDERED that the motion of defendants Mary Ann Fitzsimmons and Robert Olsen is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of the defendants Mary Ann Fitzsimmons and Robert Olsen and against the plaintiff William Fitzsimmons, DISMISSING his complaint with prejudice and costs.

Entered this 30th day of June, 1987.

BY THE COURT:

_____

JOHN C. SHABAZ
District Judge

## LIST OF WISCONSIN STATUTES THAT APPEAR TO HAVE BEEN VIOLATED DURING THE FITZSIMMONS DIVORCE ACTION

990.01(24)-OATH. When oath is required, a duly authorized official must administer oath, and oath shall end with the words "so help me God". Two violations thereof.

767.12(2)(b)-TRIAL PROCEDURE, requires: One party has stated under oath or affirmation that the marriage is irretrievably broken. Three violations thereof.

767.32(1)-REVISION OF JUDGMENT, states: "nor shall the provisions of a judgment with respect to final division of property be subject to revision or modification". Two violations thereof.

767.37-EFFECT OF JUDGMENT. Four violations with respect to the approval, certification and filing of official judgments.